

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MAX E. STRUNK</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>BIOFOODS, INC.</b>	)	
<b>BIOCORE, INC.</b>	)	
<b>HUMAN BIOSCIENCES, INC.</b>	)	
Respondents	)	Docket No. <b>1,042,860</b>
	)	
AND	)	
	)	
<b>UNINSURED</b>	)	
Insurance Carrier	)	
	)	
AND/OR	)	
	)	
<b>KS. WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Kansas Workers Compensation Fund requests review of the September 23, 2009 preliminary hearing Order and October 7, 2009 amended preliminary hearing Order entered by Administrative Law Judge Rebecca A. Sanders.

**ISSUES**

The Administrative Law Judge (ALJ) found claimant suffered a compensable injury and ordered the Kansas Workers Compensation Fund (Fund) to pay temporary total disability benefits and medical treatment. An amended Order dated October 7, 2009, corrected the September 23, 2009 to reflect that only temporary total disability benefits were ordered.

KWCF requests review of the following: (1) whether claimant was an employee of Human Biosciences, Biocore Medical Technologies or Biocore; (2) whether claimant was a statutory employee of Human Biosciences, Biocore Medical Technologies or Biocore;

and (3) whether claimant was a special employee of Human Biosciences, Biocore Medical Technologies or Biocore.

Claimant argues the ALJ's Orders should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The claimant testified that he was the general manager of respondent Biofoods, Inc., located in Oskaloosa, Kansas. He was injured on June 20, 2007 while lifting a vacuum pump in the course of his employment. It is undisputed that he suffered a compensable injury. In closing arguments at the preliminary hearing, the Fund conceded that Biofoods was claimant's employer. The Fund then argued claimant was also an employee or statutory employee of the other named respondents and even if Biofoods is insolvent the other named entities should be liable. Simply stated, the evidentiary record established that claimant was an employee of respondent, Biofoods.

The evidentiary record clearly establishes claimant was an employee of Biofoods. Accordingly, he is not required to pursue other potential statutory employers. It is against the purpose of the Act to require claimant to proceed against all potential employers before impleading the Fund.<sup>1</sup> And to the extent the Fund is required to pay, it can then pursue any employer or statutory employer to recover amounts paid claimant.<sup>2</sup>

As to the issue of Biofoods insolvency, the Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an Administrative Law Judge exceeded his or her jurisdiction. K.S.A. 44-551. This includes review of the preliminary hearing issues listed in K.S.A. 44-534a as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act. In *Carpenter*,<sup>3</sup> the Court held:

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<sup>1</sup> *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

<sup>2</sup> See K.S.A. 44-532a(b).

<sup>3</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

The term “certain defenses” in K.S.A. 1998 Supp. 44-534a refers to defenses subject to review by the Workers Compensation Board only if they dispute the compensability of the injury under the Workers Compensation Act. (Syllabus 3.)

Impleading of the Fund gives the Administrative Law Judge jurisdiction over the Fund. The fact that the case involves an injury arising out of and in the course of employment gives the Administrative Law Judge jurisdiction over the subject matter.

The decision to require payment by the Fund constitutes a legal ruling that the Fund failed to meet its burden of proving respondent’s ability to pay or existence of insurance coverage. Whether this ruling is correct or incorrect is not for the Board to decide at this stage of the proceedings, it is a ruling which the Administrative Law Judge has the jurisdiction to make. Moreover, the claimant’s entitlement to temporary total disability compensation benefits does not raise a jurisdictional issue subject to review from a preliminary hearing. The Judge did not exceed her jurisdiction in granting claimant’s request for temporary total disability compensation benefits.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>4</sup>

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>5</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>6</sup>

**WHEREFORE**, it is the finding of this Board Member that the Orders of Administrative Law Judge Rebecca A. Sanders dated September 23, and October 7, 2009, are affirmed.

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<sup>4</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

<sup>5</sup> K.S.A. 44-534a.

<sup>6</sup> K.S.A. 2008 Supp. 44-555c(k).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December 2009.

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DAVID A. SHUFELT  
BOARD MEMBER

c:     Darin M. Conklin, Attorney for Claimant  
       John F. Carpinelli, Attorney for KWCF  
       Biofoods, Inc./Biocore, Inc./Human Biosciences, Inc., 940 Clopper Rd.,  
          Gaithersburg, MD 20878-1301  
       Rebecca Sanders, Administrative Law Judge